

1998

Robert and Kathleen Sulzen, individually and as guardians of Brandon James Holton v. Seth Jepson through his general guardian Anita Williams and Shaun Carstensen through his general guardian Barry Carstensen : Reply Brief

Utah Court of Appeals

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THE UTAH COURT OF APPEALS

ROBERT and KATHLEEN SULZEN, : PLAINTIFFS' REPLY BRIEF
individually, and, as guardians
of BRANDON JAMES HOLTON, :

Plaintiffs/Appellants, :

98 - 1272 - CA

vs.

: No. 970301-CA
960904524

SETH JEPSON, a minor, by and :
through his general guardian,
ANITA WILLIAMS and SHAUN :
CARSTENSEN, a minor, by and :
through his general guardian, :
BARRY CARSTENSEN, :

Defendants/Appellees.

**UTAH COURT OF APPEALS
BRIEF**
**UTAH
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DOCKET NO. 981272-CA
Priority No. 15**

PLAINTIFFS' REPLY BRIEF

Appeal of the Decision of the Honorable Stephen L. Henroid
Third Judicial District Court
Salt Lake County, State of Utah

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COURT OF APPEALS

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THE UTAH COURT OF APPEALS

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individually, and, as guardians	:	
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SUMMARY OF ARGUMENT

Plaintiffs moved to amend the original complaint on August 8, 1996. Assuming that the November 4, 1994 appointment date of a guardian for Brandon Holton is the operative date for purposes of the statute of limitations, then the motion to amend was timely and had it been correctly granted, would have eliminated a statute of limitations defense. Therefore, it was an error not to permit amendment of the complaint.

Defendants assert that a 1987 amendment to Section 78-12-

36 U.C.A. was intended to create a statute of limitations period for minors for whom a guardian has been appointed, but still maintains a tolling period for Statute of Limitations purposes for minors, for whom no guardian has been appointed. This position is inconsistent with the history of Section 78-12-36 and an incorrect application of the 1987 amendment.

ARGUMENT

Point I

Plaintiffs moved to amend the original complaint on August 8, 1996. Assuming that the November 4, 1994 appointment date of a guardian for Brandon Holton is the operative date for purposes of the statute of limitations, then the motion to amend was timely and had it been correctly granted, would have eliminated a statute of limitations defense. Therefore, it was an error not to permit amendment of the complaint.

Defendants assert that the statute of limitations expired on Brandon Holton's claim on November 4, 1996, a date two years after the appointment of a legal guardian having the power to bring a wrongful death claim on Brandon's behalf. Assuming November 4, 1996 is then the operative date for purposes of the statute of limitations (which is disputed regarding a minor's claim in Point II of this Reply Brief), then whether or not the original complaint was incorrectly titled became irrelevant because the defect, had the motion to amend been granted, would have been cured before the November 4, 1996 date, at which time the minor boys themselves

would have been served with the amended complaint.

The body of the original complaint clearly identified the boys themselves as the alleged negligent parties. The allegations of the complaint were never against the parents of the boys, but instead, always against the boys themselves. There was never, contrary to the assertion in defendant Carstensen's brief, any claim against the parents, nor any attempt to reach their assets. Instead the complaint specifically alleged:

9. The boys negligently and carelessly dislodged a rock weighing 20 to 25 pounds as they climbed above the vertical cliff face. The rock rolled down the mountainside and fell over the edge of the vertical cliff where it struck Elizabeth Holton on the head.

The complaint itself was always correctly formed. Only the title was wrong. Therefore, before November 4, 1996, the strongest position the defendants can assert in this appeal is that the complaint was titled incorrectly. This is precisely a circumstance which Rule 15 is designed and intended to remedy, and had the motion to amend been granted, not only would the defect in the title of the complaint been remedied, but plaintiffs would have had ample time to serve the boys even before November 4, 1996.

The motion to amend the complaint was made only six weeks after the original filing. There is no prejudice which any

defendant could show by an amendment at that point. The trial court abused its discretion in failing to allow the amendment. Trimm v. Dewsnap, 851 P.2d 1178 (Utah 1993); Lewis v. Moultrie, 627 P.2d 94, 98 (Utah 1981).

Point II

Defendants assert that a 1987 amendment to Section 78-12-36 U.C.A. was intended to create a statute of limitations period for minors for whom a guardian has been appointed, but still maintains a tolling period for Statute of Limitations purposes for minors, for whom no guardian has been appointed. This position is inconsistent with the history of Section 78-12-36 and an incorrect application of the 1987 amendment.

The general law, virtually nationwide, is that a minor's claims are tolled during the minor's period of his minority. Utah has long followed this rule of law. Indeed, going back to at least 1943, Utah has had a tolling statute for minors, among others. See 104-2-37 (Code 1943). It was repealed by Laws 1951(one), ch. 58 Section 3, but was simultaneously reenacted as Section 78-12-36.

In the 1953 Code (see appendix 1), the statute read:

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either:

- 1) Under the age of majority; or
- 2) Insane; or
- 3) Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for life;

The time of such disability is not a part of the time limited for the commencement of the action.
(emphasis added)

In 1975, paragraph two (2) of Section 78-12-36 was amended. The word "Insane" was dropped and replaced with the phrase "(2) Mentally incompetent and without a legal guardian." The portion of paragraph two "and without a legal guardian" only modified the words "mentally incompetent." The words "and without a legal guardian" never modified paragraph 1 "Under the age of majority". In fact, the separate paragraphs of Section 78-12-36 were always in the disjunctive. A person could be "either" under the age of majority "or" mentally incompetent and without a legal guardian. (See appendix 2)

In 1987, the legislature took paragraph 3 relating to imprisonment out of the statute and simply dropped the numbering of paragraphs one (1) and two (2). The Amendment Notes (see appendix 3) state:

The 1987 amendment deleted the subsection references in this section as set out in the bound volume, and deleted "imprisonment on a criminal charge or in execution under the sentence of a criminal court for a term less than for life" following "without a legal guardian" and made minor changes in phraseology and punctuation throughout the section.

There is no identified intent to create, in the amended

statute, a change in its original and historical meaning, or to modify the intent of the former language contained in subsections 1 and 2.

To read such an intent into the amended statute is to move Utah away, not only from its own case law, but out of the vast majority of decisional law across the country.

In the case of Scott v. School Board, 568 P.2d 746 (Utah 1977), the Utah Supreme Court reviewed a provision of the Utah Governmental Immunity Act which required plaintiffs to give notice of claim against the State within a certain period of time. The minor argued that the notice requirement was tolled by operation of the general tolling statute. The Utah Supreme Court agreed, saying minor claimants are entitled to tolling provisions "in all cases" because "[t]o hold otherwise is a denial of due process and equal protection." Id. At 748.

In reaching this decision, the Court observed:

parents, or natural guardians, have no specific legal duty to perform and have no responsibility to their minor off-spring other than their moral obligation. Consequently, in matters of this kind, when a parent...fails for one reason or another to give notice, file suit, or otherwise protect the minor's legal interests, the minor is left completely without a remedy. This was undoubtedly one of the prime considerations which prompted the legislature to toll the statute during the minority of a claimant [in the similar notice provision.]

This holding is exactly in line with the majority rule

from across the country regarding minor's claims. See Scott v. First State Ins. Co., 456 N.W. 2d 152, 155 (Wis. 1990) ("The purpose of tolling the statute of limitations when the plaintiff is a minor is to enure that a minor's rights are not lost because a parent or guardian neglected to protect the minor by bringing a timely action."); Cross v. Pacific Gas and Electric, 388 P.2d 353 (Cal. 1964); Schierenbeck v. Minor, 367 P.2d 333, 334 (Colo. 1961) (state policy to insure minor's rights are not impaired by failure of courts and attorneys to sufficiently present their cause); Severs v. Country Mut. Ins. Co., 434 N.E. 2d 290, 292 (Ill. 1982) (minor litigants entitled to special protection by courts, especially to ensure that their rights are protected from negligence of their representatives.)

In the case of Switzer v. Reynolds, 606 P.2d 244, 247 (Utah 1980), the Utah Supreme Court said, concerning wrongful death claims that "since the cause of action is a personal property right of the heir, it would be consistent with prior interpretations of Utah law to hold the limitation period [concerning wrongful death claims] is tolled during the period of a minor's disability."

To hold that the legislature in the 1987 amendment of Section 78-12-36 intended to have "without a legal guardian" now modify "under the age of majority" raises several distinct problems. First, such a holding is inconsistent with the long standing history of this statute and the case law in this state and

would represent a complete reversal of state policy. Secondly, such a holding would raise serious due process and equal protection concerns. As observed in Scott v. School Board, minors are entitled to tolling provisions "in all cases" because "[t]o hold otherwise is a denial of due process and equal protection." This denial of due process and equal protection would be further exacerbated by such a holding regarding the 1987 amendment because minors who have no legal guardian will still receive the full benefit of the tolling statute while those who have a legal guardian are held to a shorter statute and penalized because of negligence on the part of the guardian who has no legal duty to file any claim on behalf of the minor Scott v. School Board, Id at 748; see also Hamilton by and through Hamilton v. Vaden, 721 P.2d 412 (Okla. 1986) ("the guardian has the right, but not the obligation, to sue within the prescribed period of limitation. The guardian's failure to bring suit, or the discontinuation of a suit, within the statutory period does not prejudice the minor's rights." Id. 416.) Thirdly, it makes practical and logical sense that "without a legal guardian" only continue to modify "mentally incompetent."

A mentally incompetent person might never overcome their disability, therefore, the appointment of a guardian insures that the individual will be able to exercise their rights, despite their disability. However, a minor's exercise of rights, such as pursuit

of a wrongful death claim, is not permanently impeded under any circumstance. The minor overcomes the disability within a cognizable period of time, i.e. upon reaching the age of majority. The only ones who may not do so are those who are permanently incompetent. Therefore, there is no logical or justifiable reason to create different categories for minors.

Furthermore, the recent case of Jensen v. IHC Hospitals, Inc., 314 Utah Adv. Rep. 24 (Utah 1997) is not controlling on the above issues and should not be mistakenly cited as authority for a different holding.

In Jensen, Shelly Jensen suffered injuries during the birth of her minor children which, 3 ½ years later, lead to her death. The statute of limitations on medical claims is two years. The legal claim for her injuries belonged to her, and in this case, to her legal guardian, who was appointed for her because she was in a coma during that time.

A wrongful death claim, to the contrary, is "an independent action accruing in the heirs of the deceased, Van Wagoner v. Union Pac. R.R., 186 P.2d 293, 303 (Utah 1947) Jensen Id. at 27. However, as pointed out in Jensen, when the wrongful death claim is based on some underlying wrong done to the decedent, the wrongful death claim is subject to defenses which could have been raised against the decedent, i.e. a statute of limitations defense. Citing Prosser and Keeton on the Law of Torts, Section

127 at 955 (5th Ed. 1984) our Supreme Court recognized that:

"the injured individual is not merely a conduit for the support of others, he is master of his own claim and he may settle the case or win or lose a judgment on his own injury even though others may be dependent on him." ... The majority of states refuses to allow a decedent's heirs to proceed with a wrongful death suit after the decedent has settled his or her personal injury case or won or lost a judgment before dying. *Id.* Given the underlying rationale, and given that the core purpose of any statute of limitations is to compel exercise of a right within a reasonable time to avoid stale claims, loss of evidence, and faded memories... we see no reason to impose a different rule regarding the heirs' maintenance of a wrongful death suit where an injured patient has chosen to let the statute of limitations run on the underlying personal injury claim rather than settling or litigating the claim. Jensen, at 27.

In this case, Mrs. Jensen's minor daughter's claims were not tolled because the claim never belonged to them. It was a personal property right of their mother to be enforced on her behalf by her guardian subject to the medical negligence statute of limitations applicable to an adult claimant. Thus, Section 78-12-36 was not implicated or brought into play in this instance. "The argument [that Section 78-12-36 is applicable] fails because the children's situation does not fit within the tolling statute's terms.... Shelly's children were not entitled to bring an action for wrongful death because Shelly had an appointed guardian at the time of her death." Jensen, at 29.

Thus, Jensen never reaches the question of what Section 78-12-36 (as amended in 1987) may or may not mean, and cannot be read as authority for the assertion that "and without a legal guardian" now modifies "under the age of majority." Indeed, footnote 5 to the Jensen decision specifically reserved consideration of the application of Section 78-12-36 to minors claims because in Jensen it was never brought into play. Therefore, the law of this State remains the holding in Switzer v. Reynolds, 606 P.2d 244 (Utah 1980).

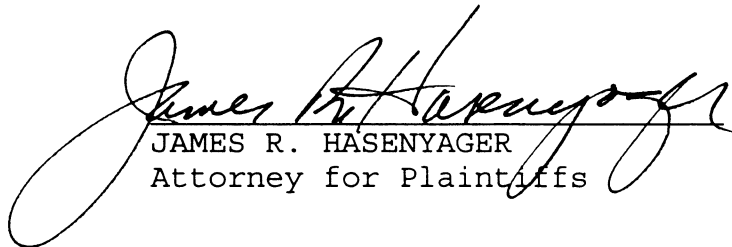
Conclusion

Brandon Holton's claim is tolled by Section 78-12-36, Utah Code Annotated and the trial Court abused its discretion in failing to allow an amendment of the original complaint.

The case should be remanded to the trial Court with instructions to reinstate Brandon Holton's wrongful death claim.

Dated this 11 day of December, 1997.

MARQUARDT, HASENYAGER & CUSTEN


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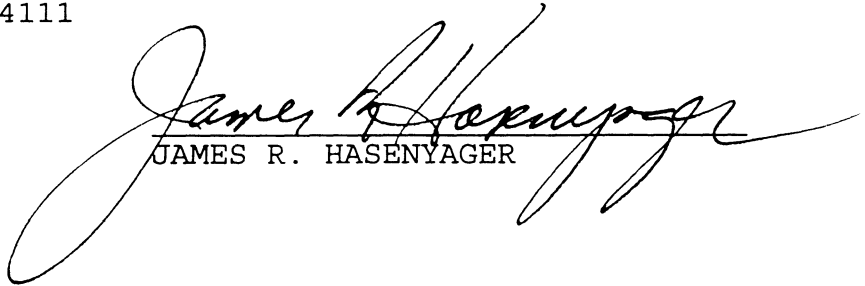
CERTIFICATE OF MAILING

I hereby certify that on this 12 day of December,

1997, I mailed two true and correct copies of the above and foregoing Plaintiffs' Reply Brief, postage prepaid, to:

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APPENDIX

of action was barred by 104-2-22, 104-2-23, and 104-2-24, subdivisions 2 and 3, then plaintiff in his reply, as required by 104-11-1, must state the conditions tolling the statute prescribed by this section, and defendant corporation is not required to prove compliance by it with requirements of Code 1953, 16-8-1 and 16-8-3 imposed on foreign corporations. *Clawson v. Boston Acme Mines Development*

Co., 72 U. 137, 269 P. 147, 59 A. L. R. 1318.

7. Doctrine in equity.

Absence of defendant from state does not preclude interposition of defense of laches to suit for an accounting, even though statute of limitations has not barred proceeding. *Smith v. Smith*, 77 U. 60, 68, 291 P. 298.

78-12-36. Effect of disability.—If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either:

- (1) Under the age of majority; or,
- (2) Insane; or,
- (3) Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for life;—

The time of such disability is not a part of the time limited for the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-12-36.

Compiler's Note.

This section is identical, with the exception of the deletion of phrase "But such action may be commenced within one year after such disability shall cease" which was deleted from former section 104-2-37 (Code 1943) which was repealed by Laws 1951, ch. 58, § 3.

Comparable Provisions.

Deering's Cal. Civ. Proc. Code, § 352; Idaho Code 1947, § 5-230 (substantially identical, except that omitted is the concluding language herein, "but such action may be commenced * * *"; an added provision is as follows: "4. A married woman, and her husband be a necessary party with her in commencing such action").

Montana Rev. Codes 1947, § 93-2703 (similar; time so limited cannot be extended more than five years by any such disability, except infancy; or, in any case, more than one year after disability ceases).

Cross-Reference.

Disaffirmance of contract by minor, 15-2-2.

Collateral References.

Limitation of Actions ⇨ 70(1).
54 C.J.S. Limitations of Actions § 216.
Personal disabilities, 34 Am. Jur. 155, Limitation of Actions § 192 et seq.

Appointment of committee for incompetent or guardian for infant as affecting running of statute of limitations against him, 128 A. L. R. 1379.

One wrongfully adjudged or committed as insane as within benefit of provision of statute of limitations allowing time to sue after removal of disability, 166 A. L. R. 960.

Proof of unadjudged incompetency which prevents running of statute of limitations, 9 A. L. R. 2d 964.

Statute providing that an insane person, minor, or other person under disability may bring suit within specified time after removal of disability as affecting right to bring action before disability removed, 109 A. L. R. 954.

Tacking disabilities for purposes of the statute, 53 A. L. R. 1303.

DECISION UNDER FORMER LAW

1. Applicability of section.

This section had no application in action against town which was barred

because of failure to file claim. *Hurley v. Town of Bingham*, 63 U. 589, 228 P. 213.

78-12-37. Effect of death.—If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year

1971

78-12-36

JUDICIAL CODE

of limitations as to judgment, 27 A L R 2d 839

Acknowledgment or payment effective to toll statute against corporation on obligation upon which it is bound as a co obligor with a corporate officer as supporting an inference of acknowledgment which will toll statute as against latter, or vice versa, 144 A L R 1015

Nonresidence or absence of defendant from state as suspending or tolling statute of limitations, where relief is sought, or could have been sought, by an action or proceeding in rem or quasi in rem, 119 A L R 331

Provision in statute of limitations as to absence from state as applied to a non resident individual who has an office or place of business in the state, 61 A L R 391

Provision of statute excluding period of defendant's absence from the state as applicable to a local cause of action against individual who was a nonresident when the same arose, 17 A L R 2d 502

Provision of statute of limitation excluding period of absence of debtor or defendant from state as applicable to action on liability or cause of action accruing out of state, 148 A L R 732

Provision suspending limitations while defendant is a nonresident or without the state as affected by nonresidence of party asserting cause of action, 83 A L R 271

Right to enter judgment by confession as affecting suspension of statute of limitations during absence of debtor from state, 172 A L R 997

Statutory provision denying or limiting right of nonresident, or of resident absent from state, to benefit of statute of limitations, as affected by fact that he was subject to service of process during absence or nonresidence, 119 A L R 859

Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit of limitations remained subject to service during absence or nonresidence 55 A L R 3d 1158

Validity and construction of war enactment in United States suspending operation of statute of limitations 137 A L R 1440, 140 A L R 1518 145 A L R 1473

War as suspending running of limitations in absence of specific statutory provision to that effect 137 A L R 1454, 140 A L R 1518, 141 A L R 1511, 145 A L R 1473

78-12-36 Effect of disability—If a person entitled to bring an action, other than for the recovery of real property is at the time the cause of action accrued, either

- (1) Under the age of majority, or,
- (2) Mentally incompetent and without a legal guardian, or,
- (3) Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for life,—

The time of such disability is not a part of the time limited for the commencement of the action

History L 1951, ch 58, § 1, C 1943, Supp, 104-12 36, L. 1975, ch 67, § 16

Compiler's Notes

This section is similar to former section 104 2 37 (Code 1943) which was repealed by Laws 1951 ch 58 § 3 except for the deletion of the concluding phrase "But such action may be commenced within one year after such disability shall cease"

The 1975 amendment substituted "Mentally incompetent and without a legal guardian" in subd (2) for "Insane"

Cross References

Actions to recover real property, effect of disability, 78 12 21

Age of majority, 15 2 1

Disaffirmance of contract by minor, 15 2 2, 15 2 3

Product Liability Act, limitations provisions applicable regardless of disability, 78 15 3

Nonresident motorists

Nonresident motorists were not absent from the state so as to toll running of statute of limitations although they left state immediately after automobile collision and remained without state, as they had an agent in person of secretary of state upon whom process could have been served under 41 12 8 Snyder v Clune, 15 U (2d) 254, 390 P 2d 915

Notice of claim requirements

This section had no application to action against town which was barred because of failure to file claim Hurley v Town of Bingham, 63 U 589, 228 P 213, construing former statute

1987

78-12-36

JUDICIAL CODE

—**Defendant's family.**

The full time that the debtor is out of the state must be excluded in computing the time, notwithstanding fact that debtor's family may have residence or place of abode in state and that service of process could be made upon some member of debtor's family at its residence

or place of abode *Keith-O'Brien Co v Snyder*, 51 Utah 227, 169 P 954 (1917)

—**Statute tolled.**

Maintenance of residence within state with persons living therein did not prevent tolling of statute of limitations *Buell v Duchesne Mercantile Co*, 64 Utah 391, 231 P 123 (1924)

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah *Graham v Sawaya*, 1981 B Y U L Rev 937, 945

Am. Jur. 2d. — 51 Am Jur 2d Limitation of Actions § 154 et seq

C.J.S. — 54 C J S Limitations of Actions § 211

A.L.R. — Tolling of statute of limitations during absence from state as affected by fact that party claiming benefit of limitations remained subject to service during absence or nonresidence, 55 A L R 3d 1158

Key Numbers. — Limitation of Actions ⇐ 84, 85

78-12-36. Effect of disability.

If a person entitled to bring an action, other than for the recovery of real property, is at the time the cause of action accrued, either under the age of majority or mentally incompetent and without a legal guardian, the time of the disability is not a part of the time limited for the commencement of the action

History: L. 1951, ch. 58, § 1; C 1943, Supp., 104-12-36; L. 1975, ch. 67, § 16, 1987, ch. 19, § 5.

Amendment Notes — The 1987 amendment deleted the subsection references in this section as set out in the bound volume and deleted "imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for life" following "without a legal guardian" and made minor changes in phraseology and punctuation throughout the section

Compiler's Notes. — Laws 1987, ch 19 § 6 provides that the amendment to this section applies only to causes of action that arise after

April 27 1987 and has no retroactive application

Cross-References. — Actions to recover real property, effect of disability § 78-12-21
Age of majority § 15-2-1

Disaffirmance of contract by minor, §§ 15-2-2, 15-2-3

Guardians of incapacitated persons, § 75-5 301 et seq

Medical malpractice actions limitations provisions applicable regardless of disability, § 78-14-4

Product Liability Act, limitations provisions applicable regardless of disability, § 78-15-3

NOTES TO DECISIONS

ANALYSIS

Notice of claim requirements

—Failure to file

—Action barred

—Action not barred

Paternity action

—Minority

Wrongful death

—Minority

Cited